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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-000330

Case No. 2019-CP-40-03582

Julia B. Brooker,…….Respondent

v.

Beacham O. Brooker, Jr., in his individual capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust, and Ellen B. Corontzes individually and as a Beneficiary of the Janet B. Brooker Trust,…….Appellants

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PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellants Beacham O. Brooker Jr., in his individual capacity as Trustee and individually as a Beneficiary of the Janet B. Brooker Trust, and Ellen B. Corontzes individually and as a Beneficiary of the Janet B. Brooker Trust, by and through their undersigned counsel, respectfully petition this Court for a rehearing based on fact, points, and arguments overlooked or misapprehended as set forth herein.

In its Opinion, this Court correctly states that "'the primary consideration in construing a trust is to discern the settlor's intent.'" (Op. at 2 (quoting *Bowles v. Bradley*, 319 S.C. 377, 380, 461 S.E.2d 811, 813 (1995).) However, this Court did not correctly discern the settlor's intent because it ignored (1) the language of "from the date of this trust forward" in the Trust and (2) the sole competent testimony – the testimony of W. Steven Johnson, Esquire, the estate planner for

the settlor. Thus, this Court did not engage in its primary directive, which is to discern the settlor's intent. The settlor ("Janet" or "Settlor") intended for the equalization provision to only include gifts "from the date of the Trust forward." Respectfully, this Court erred by concluding that the equalization provision is to account for gifts predating the Trust. Appellants ask this Court to reconsider its Opinion and reverse the probate and circuit courts.

I. The Court Overlooked the Meaning of "From the Date of This Trust Forward" in the Equalization Provision.

This Court did not address the key language in the Trust regarding the equalization provision. Notably, this Court did not address the import of the phrase "***[f]rom the date of this trust forward***, the Trustee shall determine the date and the amount of any lifetime gifts . . . ." (R 642.) (emphasis added)). This language must mean something.[1] 17A CJS, *Contracts*, §§399-400, pp. 289-91 ("A construction rendering a provision, term, or part meaningless, superfluous, surplusage, useless, inexplicable, or nugatory should be avoided."); *Babb v. Wade Hampton Golf Club, Inc.*, No. 1:21-CV-333-MOC-WCM, 2024 WL 189029, at *4 (W.D.N.C. Jan. 17, 2024) ("In contract construction, as in statutory interpretation, it is axiomatic . . . that each word is to be given meaning and effect.") (internal quotation marks omitted)). It means that Beacham O. Brooker Jr. ("Beach" or "Trustee") and Janet, until her death, were to start counting all tax-advantageous gifts

[1] It does not mean that Beach's duties as trustee began on that date. His duties as trustee arose when he and Janet signed the Trust. And it does not mean that Beach should start accounting for all gifts given to the grandchildren and spouses from the date of their births. Janet was well and alive in 2007 when the Trust was signed. It makes no common sense to have Beach calculate transfers before the Trust because Janet had that information.

Moreover, Janet was co-trustee from 2007 until her death in 2015. (R. 640-54.) She had just as much of a duty to calculate gifts, as Beach did. Because she had the knowledge of gifts she made, she would have been the one to calculate those gifts. She would be placing an undue burden on Beach to track down every transfer since the grandchildren's births. In other words, she would not be treating all of her children fairly by placing this substantial burden on Beach.

Janet made to her children's spouses and children from October 2007 forward (the date of the trust). It cannot be lost that one of the main reasons Janet entered into this new estate plan, including the Trust, was to substantially reduce her Estate because it was going to face severe tax consequences. (R. 438-41.) Thus, Beach and Janet, until her death, were to calculate all tax advantageous gifts from October 2007 forward to the non-blood members of the family (spouses) and the grandchildren. Since Julia did not have children or a spouse, she would be disadvantaged, which prompted the equalization provision.

This Court says, "[t]he plain language of the equalization clause does not provide a clear answer, but equal means equal, and as we noted above, it is uncontested that Decedent intended to not only treat all of her children equally, but also to align Julia with the children and spouses of Beacham and Ellen." (Op. at 3.) But what is not appreciated with respect to this statement is that Janet was keeping her children equalized by her own means before 2007. In other words, prior to 2007, Janet equalized gifts among her three children through various means. She made annual exclusion gifts to her grandchildren, but she paid for trips around the world for Julia. (R. 545-48 & 512.) Additionally, Janet could have equalized the children in other manners that she kept to herself. She expressed no concern about Julia being disadvantaged pre-trust; it was only when the spouses were going to start receiving gifts that Janet became concerned with Julia being disadvantaged, as discussed below.

Under this Court's construction of the equalization provision, Julia is being favored. She is getting credit for every birthday gift that Janet gave to her grandchildren. She is getting credit for every transfer of cash or stock to the grandchildren even if an equivalent gift was given to

Julia.[2] It is only when the non-blood members of the Brooker family started receiving gifts from Janet did Janet express a concern of Julia not being treated fairly. She resolved this concern by having Mr. Johnson draft an equalization provision that states that her Trustee Beach was to equalize Julia "from the date of the trust forward." She did not intend for Beach to look backwards to calculate gifts before he became the trustee. It makes no common sense.

II. This Court Overlooked the Totality of W. Steven Johnson's Testimony.

This Court affirmed that the Trust is ambiguous, and therefore, extrinsic evidence is permissible to evaluate Janet's intent. (Op. at 2.) Mr. Johnson,[3] the estate planning attorney who suggested the aggressive gift-giving program and drafted the estate plan with the equalization provision, is the sole source (other than the Trust, itself) of what Janet's intent was. He had conversations with Janet about her intent, and then he drafted the estate plan to carry out her intent. Consideration of his testimony is crucial for this Court to follow the cardinal rule to determine the settlor's intent. His testimony cannot be cherry-picked to establish that Janet wanted her children

[2] Notably, no gifts were given to spouses before 2007. The spreadsheet noting all gifts shows a loan forgiveness to Ellen's spouse in 1995. (R. 547.) However, this was a gift to Ellen because the property securing the loan that was in her spouse's name for estate planning purposes. Julia received the same loan forgiveness as Ellen did, although it was noted on the books as forgiveness for Ellen's spouse. Thus, Julia is getting a credit for a gift to Ellen when Julia received the same gift.

[3] Mr. Johnson is a certified specialist in estate planning and probate by the South Carolina Supreme Court. (R. 437.) He has been working with the Brooker family since he helped with the administration of Mr. Brooker's estate in 1990. (R. 437-38.) Julia's expert (George W. DuRant, CPA) testified about Mr. Johnson as follows: "I have great respect for Steve Johnson. I've relied on him all my career just about since 1986; he's a top lawyer, and I don't dispute a word he says." (R. 427.)

to be treated equally, and then the balance of his testimony be ignored when he says that the equalization provision was only intended to capture gifts after the Trust was executed.[4]

The testimony of the drafting attorney is critical to understanding Janet's intent when the document is ambiguous. Courts have held that it is in error to ignore the testimony of the drafting attorney when consideration of that testimony would have clarified the ambiguity in the estate planning document. *See, e.g., In re Resler's Estate*, 278 P.2d 1, 6 (Cal. 1954) (holding the trial court erred in excluding testimony of the attorney who drafted the will regarding the decedent's intent "[a]s proof of such intention would determine the amount of the bequest under [the will]"); *In re Trust Created by Agreement Dated Dec. 20, 1961, ex rel. Johnson & Hoffman, Lienhard & Perry*, 944 A.2d 33, 40–45 (N.J. Super. Ct. App. Div. 2006) (affirming trial court's admission of testimony by drafting attorney, noting that "[a]s the drafter of the 1961 Trust, he was in a particularly favored position to understand the purpose of the 1961 Trust and the intent of the grantor[,]" and that "the exclusion of this testimony would have been error" as the drafting attorney "was in a unique position to provide information about the circumstances surrounding the drafting and execution of the instrument").

At a minimum, the drafting attorney's testimony is significant to determine the testator's intent. *See, e.g., In re Estate of Deupree*, 54 P.3d 542, 546 (N.M. Ct. App. 2002) ("Of the evidence presented [as to testamentary intent], we find most significant the testimony of the attorney who

[4] This Court states that "the probate court ultimately disagreed with the estate planner's testimony about including pre-trust gifts in the equalization . . . ." (Op. at 4.) This Court has *de novo* review of this matter. While *de novo* review does not necessarily preclude this Court from deferring to the probate court regarding witness credibility, *de novo* review also allows this Court to make factual findings in accord with its own view of the preponderance of evidence. *In re Howard*, 315 S.C. 356, 362, 434 S.E.2d 254, 257-58 (1993). When viewing Mr. Johnson's testimony on the whole, this Court respectfully should make its own factual findings regarding intent and that Mr. Johnson's credibility is unfaltering. Before and during this litigation, he has never wavered from his position on (1) the Settlor's intent and (2) the construction of the Trust.

drafted the trust instrument[,]" noting "[n]one of [the other] witnesses had firsthand knowledge of [decedent's] intent in drafting the specific trust provisions in question"); *Schroeder v. Gebhard*, 825 So. 2d 442, 443 (Fla. Dist. Ct. App. 2002) ("While there was conflicting testimony at trial regarding [testator's] intent to include all, or some of the adopted in and adopted out children in the trust in the event that [testator's son] predeceased her, the most relevant testimony regarding her intentions and the trust drafting process came from Stalnaker, the attorney who drafted the trust agreement."); *In re Segal*, Nos. 1 CA-CV 06-0101, 1 CA-CV 07-0157, 2008 WL 3919187, at *7 (Ariz. Ct. App. 2008) (noting the lower court "found the 'only credible evidence' regarding [decedent's] intent came from the attorney who represented [decedent] and drafted the 1996 Trust Amendments"); *Danelczyk v. Tynek*, 616 A.2d 1311, 1314 (N.J. Super. Ct. App. Div. 1992) (affirming trial court's interpretation of a will, noting the trial court's finding that "the 'most significant testimony' revealing testator's intent came from . . . the attorney who drafted the will"); *Trupp v. Naughton*, No. 320843, 2015 WL 3389414, at *1, 4 (Mich. Ct. App. May 26, 2015) (holding probate court did not err in relying on deposition testimony of drafting attorney to determine settlor's intent and meaning of phrase in the trust); *Cf. In re Estate of Combee*, 583 So. 2d 708, 712 (Fla. Dist. Ct. App. 1991) (holding that for an estate to overcome a statutory presumption, it must show "a clear statement of a contrary intent by the deceased, or evidence of a contrary intent based upon testimony from the attorney who prepared the probated will, a bank employee or a person with special knowledge regarding the decedent's estate plan").

Against the backdrop of this long line of cases, Mr. Johnson's testimony must be given significant weight. Mr. Johnson testified as follows:

- "At that point in time, there was a heightened awareness of the -- this was in '07 -- of the need to make some gifts to accelerate her gifting program so that at her death the estate taxes would be somewhat lessened." (R. 439)

- At a September 25, 2007 meeting with Mr. Johnson, Janet, and her children, all of the parties discussed "[t]hat we would accelerate the gifts that Mrs. Brooker was going to make; that we were going to make gifts not only to children and grandchildren, but that we would also make gifts to in-laws. As an estate planner, you know, I was primarily relying on Internal Revenue Code Section 2503 and Code Section 529. And I talked with Mrs. Brooker at that time about the avenues that would be available to her to make gifts to the children, the grandchildren, and the spouses of the children." (R. 440-41)

- "You can make gifts to grandchildren and you can make gifts to spouses of children. And her [Janet's] comment to me at that particular point in time was that, if I make gifts -- if I make gifts to Dino and … Beach's wife, that that will disadvantage Julie. She said, that will disadvantage Julie. And I said to her at that time, well, if you decide to go ahead and make those gifts, you can put a provision in the document that at your death will catch the -- will catch Julie up for the gifts going forward that have been made to the spouses of children. Also, we talked about accelerating the pace of the gifts to the children through what's known as a 529 account." (R. 264)

- "when I suggested to her that she could make annual gifts not only to children and grandchildren, she could make gifts to spouses of children, and she gave me some pushback at that time saying that would disadvantage Julie. And I said well, it will not disadvantage Julie if we catch Julie up at your death as to gifts that are going to be made to the grandchildren as well as the spouses." (R. 443)

- "the whole discussion centered around gifts going forward." (R. 444)

- "the whole conversation with Janet was about prospective gifts, not retrospective gifts. . . . It was going forward, not looking back." (R. 183)

- "we'll catch Julie up at death for gifts made from the Trust Agreement forward so that she won't be prejudiced." (R. 463)

- Janet didn't have concern about Julia being disadvantaged because of gifting to grandchildren, but disadvantaged because of gifting to spouses (R. 266)

- Regarding the language of the Trust Agreement, Mr. Johnson testified "previously made lifetime gifts … is qualified by Paragraph (a), which says from the date of this trust forward. You have to read the four corners of Paragraph 2 and it says from the date of the trust forward looking at the lifetime gifts." (R. 184)

- If Janet brought up past gifts to Ellen or Beach and said Julia needs to be "equalized for that, I would have said to her let's equalize it right his minute, let's make a gift to her right this minute, let's give her -- let's make a gift to Julie right now if she's been so disadvantaged. We're trying to reduce the size of your estate, let's give her an amount right now that will make her equal." (R. 358)

In sum, the conversation with Janet was about prospective gifts. (R. 442.) Further, he testifies if Janet wanted to consider pre-trust gifts, he would have advised Janet to equalize Julia at the time he was drafting the estate plan. This Court expresses some concern over "the mathematical fact that it was not possible to treat Julia equally without accounting for the substantial pre-trust gifts Decedent made, particularly to her grandchildren." (Op. at 4.) But respectfully, this concern is undercut by the fact that Janet never talked about these pre-trust gifts with Mr. Johnson. If she thought these pre-trust gifts were going to disadvantage Julia, she would have discussed her concerns with Mr. Johnson, but she did not. This is because Janet, by herself, was equalizing all gifts among her children. She paid for numerous trips around the world for Julia.[5] (R. 511-12.)

Moreover, as Mr. Johnson testified, Janet was not concerned about the gifts to the grandchildren. Rather, she was concerned about the gifts to the spouses. (R. 264 & 266) Undisputably, she had been making annual exclusion gifts to her grandchildren before the Trust, and she was equalizing Julia, whether it be through the trips around the world or some other means. But, it speaks volumes that she did not express any concern to Mr. Johnson about pre-trust gifts. The logical conclusion is she was not worried about Julia being disadvantaged. This is especially true when the fact that she voiced no concern about pre-trust gifts is juxtaposed to the fact that she was concerned about post-trust gifts to "non-blood," i.e. spouses, and the resulting disadvantage to Julia. The totality of Mr. Johnson's testimony is compelling, explains any ambiguity in the Trust, and should be considered in its totality to understand fully Janet's intent.

[5] These experiences included trips to Peru, Galapagos Islands, Japan, Bali, Hong Kong, Indonesia, China, and Beijing, Spain, France (with Ellen Corontzes), Africa, and safari in Kenya. (R. 512)

CONCLUSION

The phrase "from the date of this trust forward" must mean something. Mr. Johnson amply explained what it means and the context surrounding the phrase. It means that Beach is to count all gifts given from the date of the Trust Agreement forward to calculate the equalization distribution. Mr. Johnson also testified, in detail, that at all times Janet was looking forward with respect to the gifts. She never mentioned the gifts looking backwards. The logical conclusion regarding this omission is that she was not worried about Julia not being treated equally with the gifts pre-dating the Trust. The use of "from the date of this trust forward" and Mr. Johnson's testimony reveals Janet's intent – only post-trust gifts are to be included. Respectfully, this Court should further review Mr. Johnson's testimony to conclude that Janet's intent was to include solely post-trust gifts in the equalization distribution.

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PROOF OF SERVICE

I certify that on May 22, 2024, I have caused the service of the PETITION FOR REHEARING on Respondent via electronic mail using the email address listed in the Attorney Information System for her attorneys of record at the addresses listed below:

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May 22, 2024

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From: Amy Kelly
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Subject: Petition for Rehearing- Julia Brooker v. Beachman O. Brooker, Jr.- Appellate Case No. 2021-000330
Attachments: Brooker - Petition for Rehearing.pdf; Proof of Service- Petition for Rehearing.pdf

Dear Counsel:

Attached for service upon you is the Petition for Rehearing and the Proof of Service in the above matter. Service is made via email pursuant to the Supreme Court Order 2021-08-25-02 as amended May 6, 2022.

Thanks
Amy

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